In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 404

THE BALTIMORE & OHIO RAILROAD COMPANY AND twelve (12) other railroad companies, appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE Commission, The Chicago, Rock Island & Pacific Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company, appellees

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINIONS

The specially-constituted District Court (Circuit Judge Anderson and District Judges Wilkerson and Cliffe) filed no opinion.

The report of the Commission appears as *Chicago, Rock Island & Pacific* v. *Baltimore & Ohio,* 113 I. C. C. 681 (R. 15), July 12, 1926.

JURISDICTION

On December 8, 1926, the District Court entered its final decree dismissing the bill of complaint for want of equity. (R. 68.)

On February 5, 1927, the direct appeal to this Court was allowed. (R. 72.)

The suit was brought to set aside an order of the Interstate Commerce Commission and the jurisdiction of this Court on direct appeal rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, 220), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938; U. S. C. Title 28, Sec. 47; R. 2).

QUESTION

In practically all of the leading terminal cities and switching and interchange districts of the United States [1] it is the common practice of railroad

[1] "The line that brings in the traffic assumes the duty of delivering it to its connections" and "that is the universal practice in the United States." (Stanage, R. 107.)

"The general practice is for the delivering line to pay the charge of the intermediate switching line. There are practically no exceptions." (Brief, R. V. Fletcher, Attorney, Peoria & Pekin Union Railway; Stanage, R. 105.)

STANAGE (R. 86): East Dubuque, Savanna, Ill. (R. 107); Clinton, Iowa (R. 108); Keithsburg, Ill. (R. 110); Burlington, Iowa (R. 110); Ft. Madison, Keokuk, Iowa (R. 110); Hamilton, Quincy, Ill., Hannibal, Mo. (R. 111); Memphis, Tenn. (R. 112); Vicksburg, Natchez, Miss., Helena, Ark. (R. 118, 119); Paducah, Evansville (R. 124); Jeffersonville, New Albany, Ind., Louisville, Ky. (R. 125); Cincinnati, Detroit (R. 127); Toledo (R. 129); Cleveland (R. 135); Columbus (R. 136); Indianapolis (R. 136); Ft. Wayne (R.

common carriers reciprocally to bear the burden or expense of transferring through traffic from one line to another, and the carrier which performs the inbound haul or delivering carrier switches or trucks the freight to its connection or pays the expense of that service if performed by a third party. The notable exception is at St. Louis, Missouri, and East St. Louis, Illinois, which are divided by the Mississippi River, and which constitute one of the largest railroad gateways in the World with vast surrounding railroad switching terminal and interchange facilities. The two cities are in the same rate group and the rates to and from each are the same.

The question is, Whether it is a reasonable practice and within the power of the Commission to or-

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137); Springfield, Ill. (R. 137); East St. Louis (between Eastern lines where direct interchange exists the delivering line makes delivery at its expense) (R. 137); Chicago: "It is the universal custom in the Chicago district for the delivering line to assume the expense of effecting the delivery of its through traffic to its connections" (R. 156).

RAUSCH (R. 202): Kansas City, Mo. (R. 207); Kansas City, Kansas (R. 208); Omaha (R. 209).

HUTCHISON (R. 219): Kansas City (R. 220); Birmingham (R. 222); Tulsa, Okla., Sherman, Ft. Worth and Dallas, Tex. (R. 222).

FERTIG (R. 224): Des Moines (R. 230, 234); Minnesota Transfer (R. 230); Memphis (R. 231); Mississippi Warrior Service, Federal Barge Line (R. 231); Peoria (R. 232); Pekin (R. 232); Kansas City (R. 232); Cleveland (R. 233).

TROVILION (R. 237): Kansas City (R. 238); Oklahoma City, Dallas, San Antonio (R. 239).

NASH (R. 340): Indianapolis, Cincinnati (R. 362).

der that the East Side Lines [2] shall deliver through westbound traffic to the West Side Lines,[3] which moves on a combination of rates, i. e., certain rates to the East Side Lines up to the Mississippi, and certain rates to the West Side Lines beyond, in such a way that the East Side Lines or delivering carriers which perform the inbound haul shall pay and bear the charges of the Terminal Railroad Association which transfers the traffic from East St. Louis to St. Louis or to the terminals of the West Side Lines.

STATUTES

Section 1 of the Interstate Commerce Act as amended by Section 400, paragraphs (3) and (4), of the Transportation Act of 1920 (c. 91, 41 Stat. 456, 474, 475; U. S. C. Title 49, Section 1, paragraphs (3) and (4)), provides:

> (3) * * * The term "railroad" as used in this Act shall include all bridges,

[2] The Baltimore and Ohio Railroad Company; Chicago and Alton Railroad Company; Chicago and Eastern Illinois Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Illinois Traction (Inc.); Illinois Central Railroad Company; Litchfield and Madison Railway Company; Louisville and Nashville Railroad Company; Mobile and Ohio Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; Southern Railway Company; Wabash Railway Company.

[3] The Chicago, Rock Island & Pacific Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; St. Louis-San Francisco Railway Company.

car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable com-

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pensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Section 1 of the Interstate Commerce Act as amended by Section 400, paragraph (6), of the Transportation Act of 1920 (c. 91, 41 Stat. 456, 475; U. S. C. Title 49, Section 1, paragraph (6)) provides:

(6) It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and

every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 1 of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920[4] (c. 91, 41 Stat. 456, 476; U. S. C. Title 49, Section 1, paragraphs (10) and (11)), provides:

> (10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.
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> (11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

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[4] The above-quoted Car Service provisions enlarged the provisions of the earlier Car Service Act which was approved May 29, 1917 (c. 23, 40 Stat. 101), viz:

"The term 'car service' as used in this Act shall include the movement, distribution, exchange, interchange, and return of cars used in the transportation of property by any carrier subject to the provisions of this Act.

"It shall be the duty of every such carrier to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service, and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Section 15[1] of the Interstate Commerce Act as amended by Section 418 of the Transportation Act of 1920 (c. 91, 41 Stat. 456, 484; U. S. C. Title 49, Section 15, paragraph (1)), provides:

> SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or the rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maxi-

[1] Appendix C consists of explanatory statements of Representative Mann when the act of 1910 was under consideration.

mum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under

> which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

Section 15, paragraph (6), of the Interstate Commerce Act as amended by Section 418 of the Transportation Act of 1920 (c. 91, 41 Stat. 456, 486; U. S. C. Title 49, Section 15, paragraph (6)), provides:

> Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received

by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

Section 13 of the Interstate Commerce Act, as amended by Section 11 of the Commerce Court Act (c. 309, 36 Stat. 550; U. S. C. Title 49, Section 13)

and as further amended by Section 416 of the Transportation Act of 1920 (c. 91, 41 Stat. 484), now provides:

> (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. * * *
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> (3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. * * *

STATEMENT

East St. Louis is located on the east bank of the Mississippi at which come to an end the rails of the appellants or East Side Lines. St. Louis is located on the west bank at which come to an end the rails of the appellees or West Side Lines. Chicago, Burlington & Quincy Railroad and Wabash Railway serve both cities with their own rails and were cross-complainants before the Commission with the West Side Lines. The tracks of none cross the river at St. Louis (113 I. C. C. 682; R. 16.)

Intervening between the rails of the East Side Lines and the rails of the West Side Lines lie the rails of the Terminal Railroad Association which performs a terminal switching or interchange service (*United States* v. *Terminal Railroad Association*, 224 U. S. 383; 236 U. S. 194) by which traffic is transferred from one side of the river to the other (113 I. C. C. 682; R. 16). Fifteen of the principal East Side Lines and the West Side Lines own in equal proportions the capital stock of the Terminal Association of which East Side Lines hold the majority (113 I. C. C. 685; R. 20).

The contract between the carriers and the operation of the Terminal's facilities contemplate that all carriers shall have equitable treatment in the matter of service, rights, accommodations, benefits, burdens, expenses and charges (113 I. C. C. 685; R. 21). The Commission found that "under this contract the properties of the Association repre-

sent, in legal and practical effect, the extension of the East Side Lines into St. Louis and of the West Side Lines into East St. Louis" (113 I. C. C. 686; R. 21); also "several of the East Side Lines own or lease other facilities in St. Louis, such as depots and team tracks, where they receive and deliver in their own names traffic moving between St. Louis and points on their lines;" they also "advertise through service to and from St. Louis and in their tariffs show St. Louis as a point on their lines" (113 I. C. C. 686; R. 21); and "in apparently all respects as to both freight and passenger traffic the East Side Lines individually recognize St. Louis as a station on their lines" (113 I. C. C. 686; R. 21).

Under the per diem rules of the American Railway Association, the carrier performing the inbound haul shall pay the car-rental charges and the East Side Lines relieve the Terminal Association of those rental charges on equipment by allowing the Association's switching reclaims (113 I. C. C. 686; R. 22).

For years past the West Side Lines have borne the transfer charges of the Terminal Association on practically all eastbound (71% of the total, or $1,746,016.55) and all westbound (29% of the total, or $713,161.69) through traffic. They were willing to continue the present practice with respect to all eastbound traffic, but were not willing to do so with respect to any westbound traffic (113 I. C. C. 682;

R. 17), from which charges they sought to be relieved (113 I. C. C. 683; R. 17).

Much of the traffic moving through the St. Louis-East St. Louis gateway moves on *joint* rates, i. e., one rate from origin to destination regardless of the number of carriers participating in the haul;[5] as to all of that traffic the "divisional arrangements" among the carriers provide that the joint rates both eastbound and westbound shall "break" on East St. Louis; i. e., certain proportions shall accrue up to that point and certain proportions beyond (113 I. C. C. 683; R. 18); as the "divisional arrangements" make no specific provision regarding the payment or disposition of the transfer expense (113 I. C. C. 683; R. 18) and as the joint rates "break" on East St. Louis and the transfer takes place west of that point, the East Side Lines have always left the transfer expense to be borne by the West Side Lines on all eastbound and west-

[5] *St. Louis-Southwestern Railway* v. *United States*, 245 U. S. 136, footnote, 139:

"A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. *Through Routes and Trough Rates*, 12 I. C. C. 163, 166. Ordinarily 'through rates' lower than 'the sum of the locals' are 'joint rates.'"

bound through traffic (113 I. C. C. 683; R. 18). The practice of "breaking" the joint rates on East St. Louis rather than on St. Louis is said to have prevailed since 1877, when the Chicago & Alton extended its line from the west across the Mississippi River at Louisiana, Missouri, thence south to East St. Louis, which created a situation which the West Side Lines had to meet (113 I. C. C. 684; R. 19).

The balance of the traffic under consideration moves on combinations of locals, or locals and proportionals, to and from East St. Louis. Generally the local rates of both sets of carriers to and from East St. Louis are the same as those to and from St. Louis which makes the combination rates based on St. Louis the same as those based on East St. Louis (113 I. C. C. 684; R. 19). Where the combination is the same, on traffic in both directions the East Side Lines apply their St. Louis-East St. Louis rates only to or from East St. Louis, leaving the West Side Lines to protect the combination rates by applying the St. Louis-East St. Louis rates to or from East St. Louis which, of course, compels the West Side Lines to pay the cost of the transfer and leaves the East Side Lines with the full St. Louis-East St. Louis rates to or from East St. Louis (113 I. C. C. 684; R. 19). This entire practice is in accord with the tariffs of the East Side Lines, which provide that where no joint rates are provided and the combinations are the same on St. Louis as on

East St. Louis, through rates will be made on the East St. Louis combination* (113 I. C. C. 684; R. 19; see p. 35).

Obviously, the combination rates to and from St. Louis and East St. Louis overlap (113 I. C. C. 688; R. 24). St. Louis and East St. Louis, as to traffic moving to and from these points, are in one rate group (113 I. C. C. 689; R. 25).

The history of both the combination rates and the divisions of the joint rates applicable to this traffic indicates the transfer charge of the Association was given little or no consideration in the establishment of any of these rates or divisions. East Side Lines have taken advantage of the situation to require the West Side Lines to continue to pay the transfer charges on *all* traffic, eastbound and westbound, although St. Louis is shown as a point on the East Side Lines (113 I. C. C. 689; R. 25), and all of the traffic moves through St. Louis. East Side Lines are the connecting carriers whose lines, by virtue of the fact that St. Louis is shown as a point on their lines, extend to the respective points of interchange with West Side Lines in St. Louis, and, in the absence of any agreement to the contrary, responsibility for transporting this traffic rests with the East Side Lines until its delivery to West Side Lines in St. Louis (113 I. C. C. 689; R. 25).

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*Westbound traffic from and to points in territory within about 100 miles of the St. Louis-East St. Louis district is embraced in this case, as it moves on a different rate adjustment.

The Commission found "that for the future the practice of the east-side lines in requiring the West Side Lines to bear the transfer charges on westbound freight traffic moving through St. Louis and East St. Louis on combination rates which are the same on St. Louis as on East St. Louis will be unjust and unreasonable, and that the just and reasonable practice with respect to such traffic will be for the east-side lines to bear or absorb all such transfer charges" (113 I. C. C. 690; R. 26).

SUMMARY OF ARGUMENT

I. The practice which requires the West Side Lines to bear the charges of the Terminal Association which transfers traffic across the river to the interchange tracks of the West Side Lines is contrary to the practice in practically all of the leading terminal cities and switching and interchange districts of the United States. The practice was condemned by Circuit Judges Sanborn, Carland, Stone and Lewis after full hearings; by the Commission after full hearing which issued the cease and desist order; and by the specially-constituted three-Judge District Court at Chicago which dismissed the bill. With this weight of authority there is little left for decision; as in *Terminal Railroad Association* v. *United States,* 266 U. S. 17, the Court fixed the jurisdiction of the Commission over the subject.

II. West Side Lines have been and are willing to bear the transfer charges on all eastbound traffic. The total transfer charges divided 71% or $1,746,-016.55 eastbound and 29% or $713,161.69 westbound. The order is restricted to traffic which moves on combination rates, which is not more than 15% of the 29%, or on which the transfer charges amount to about $106,000 a year; and accomplishes but a small portion of the relief prayed which was from the burden of the transfer charges on all westbound traffic.

III. Without dispute as to the determinative facts, *in limine* the Government and the appellants divide on the main questions involved for decision. The Government maintains the case concerns a practice and is controlled by the statutes and decisions relating to practices. The appellants maintain the case relates to divisions and is controlled by the statutes and decisions relating to divisions, and also that the West Side Lines were without statutory authority to bring the proceeding. Similarly, the same parties divide on the force and effect of the decision in *Terminal Association* v. *United States,* 266 U. S. 17. They maintain the instant case "has been indubitably stamped as a rate and divisions case" and the Government maintains that case held nothing of the kind.

IV. The antecedent history of *Terminal Association* v. *United States,* 266 U. S. 17, and the evidence

before and findings of the Commission all indicate the properties of the Association represent, in legal and practical effect, the extension of the East Side Lines into St. Louis and of the West Side Lines into East St. Louis; that the combination rates to and from St. Louis and East St. Louis overlap and the two points are in one and the same rate group.

V. There may be no blending of "divisions" and "practices." Each is specifically and separately treated in the statute and the Commission and the Court have also treated them in that way. The West Side Lines have their receiving rails on the west bank and the operating expense of the transfer to their interchanges is about as far removed from divisions as any operating expense would be which reduces net revenue, e. g., repairs, coal, car rentals, oil, etc.

VI. "Transportation includes delivery" and under every system of railroad operation and canon of rate-making the inbound or delivering carrier is under legal obligation to make delivery at its own cost to its connection at appropriate interchanges such as exist in this case.

ARGUMENT

I

THE CASE CONCERNS A PRACTICE AND THAT ONLY

There is little or no dispute of the determinative facts. There is an irreconcilable difference between

the appellants and this appellee on the main question involved for decision.

(A) They maintain the case does not relate to a practice because the word "practice" as used in the Act relates only to matters between shippers and carriers and not to questions affecting the handling of traffic between carriers (Br. 47); that the case is a "divisions" case and that only; and the Commission failed to give consideration to all of the facts and circumstances prescribed by the statute (c. 91, 41 Stat. 456, 486; *ante*, pp. 10, 11); therefore, they say the order is void as without evidence to support it, as in *Brimstone Railroad & Canal Co.* v. *United States* (No. 240, October Term, 1927, February 20, 1928); they also claim the statute was designed to regulate the practices of carriers against shippers and not the practices of carriers against carriers.

The Government maintains the case relates to a "practice" as that term is used in paragraphs (6) and (11) of Section 1, and paragraph (1) of Section 15; that in the use of that term the statute draws no limitation between shippers and carriers and that the West Side Lines had the right to file the complaint under Section 13 (36 Stat. 550; *United States* v. *New York Central*, 272 U. S. 457, 462; *Pennsylvania Railroad* v. *United States*, 236 U. S. 351.)

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If that argument is sound, it may not seriously be maintained that the order is void as without evidence to support it.

What is a practice? Lexicographers have approached a similarity in their definitions.[7] In *United States* v. *Pennsylvania Railroad,* 242 U. S. 208, 229, this Court, in referring to the word *practice* as it appeared in Section 15, said: "Following a well-known rule of construction we must rather suppose its association was intended to confine it to acts of conduct having the same purpose as its associates."

What are its associates? Section 1 (6): it is the duty of all common carriers "to establish, observe,

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[7] *Bouvier:* "A succession of acts of a similar kind or in a like employment, Webst."

Black: "A succession of acts of a similar kind or in a like employment."

Century: "1. Action; exercise; performance; the process of accomplishing or carrying out; performance or execution as opposed to speculation or theory. * * * 3. Frequent or customary performance; habit; usage; custom."

Webster: "1. Action; performance; operation; also, an action; deed; proceeding."

Murray: "1. The action *of* doing something; performance, execution; working, operation; method of action or working. * * * 2. The habitual doing or carrying on *of* something; usual, customary, or constant action; action as distinguished from profession, theory, knowledge, etc.; conduct. * * * c. A habitual way or mode of acting; a habit, custom; (with *pl.*) something done constantly or usually; a habitual action."

and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or *practices* are or may be made or prescribed, and just and reasonable regulations and *practices* affecting classifications, rates, or tariffs, * * * the facilities for transportation, * * * and all other matters relating to or connected with the receiving, handling, *transporting,* storing, and delivery of property * * * which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property * * * upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and *practice* is prohibited and declared to be unlawful." Section 1 (11): "It shall be the duty of every carrier * * * to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and *practices* with respect to car service; and every unjust and unreasonable rule, regulation, and *practice* with respect to car service is prohibited and declared to be unlawful"; and car service (10) "shall include the use, control, supply, movement, distribution, exchange, *interchange,* and return of locomotives, cars, and other vehicles used in the transportation of property, * * * and the supply of trains, by any carrier" * * *. Section 15 (1): "That whenever, after full hearing, * * * the Commission shall be of opinion that

any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers * * * or that any individual or joint classification, regulation, or *practice* whatsoever of such carrier or carriers * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or the rates, fares, or charges, to be thereafter observed in such case, * * * and what individual or joint classification, regulation, or *practice* is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or *practice* so prescribed" (c. 91, 41 Stat. 456, 484; U. S. C. Title 49, Section 15, paragraph (1).

With this association of words how may it successfully be maintained that "practice" and "practices" do not comprehend within their meaning the precise situation here presented? In *United States* v. *Pennsylvania Railroad,* 242 U. S. 208, the carrier had flatly refused to furnish to shippers tank cars of a special type, and it was held that its refusal was not a "practice" within the meaning of these acts. The situation in that case so widely differs with the present situation that the suggestion of opposing counsel (Br. 48) that the Commission "ignored the meaning and effect of this decision" can not prevail.

(B) The complaint, without any use or mention whatever of the word *divisions,* alleged that the *practice* of requiring the complainants and other West Side Lines to assume the burden of delivering through eastbound traffic at points on the east side of the Mississippi, and to accept and receive all westbound through traffic at points on the east side of the Mississippi, and to pay and ultimately bear the transfer charges for all the through westbound and eastbound traffic through these gateways, is unjust, unreasonable, unduly preferential, unjustly discriminatory and unduly prejudicial, unlawful and illegal; that under a proper, just, reasonable, lawful, nonprejudicial and nonpreferential *practice,* the East Side Lines should assume the burden of and effect delivery of all through westbound traffic at St. Louis (R. 35), and should pay and

ultimately bear the transfer charges thereon; that under a proper, just, reasonable, lawful, nonprejudicial and nonpreferential *practice* the point of interchange as to all through westbound traffic should be on the west side of the Mississippi; that the East Side Lines have failed, neglected, and refused, and now fail, neglect, and refuse, to provide reasonable facilities for operating through routes and to make *reasonable rules and regulations* with respect to the operation of through routes (R. 36).

The complaint prayed for an order directing the East Side Lines to cease and desist from the aforesaid practices (R. 37), and that the East Side Lines be required to pay and bear the transfer charges on all westbound traffic through said gateways and to effect delivery thereof to the West Side Lines at St. Louis Switching District (R. 37), or on the west side of the Mississippi; and that the East Side Lines be required to provide reasonable facilities for operating through routes through St. Louis and to make reasonable rules and regulations therefor (R. 37).

The West Side Lines, therefore, complained of a *practice* and not of *divisions.* In answering the complaint, the East Side Lines set up "the sole question in this case is as to the lawful measure of the amounts received by the East Side Lines and the West Side Lines, respectively, for their services." (Br. 5.)

Opposing counsel concede (Br. 5) that at the hearing before the Commission the West Side Lines "insisted on confining the inquiry to the allegations of the complaint, which related to a matter of practice only" (Br. 5); and they quote from the brief of the West Side Lines in which their counsel say, "the question of the rates and divisions has nothing to do with a proper practice regarding the interchange of traffic," and "our complaint relates only to the matter of reasonable rules and regulations governing interchange between carriers at a terminal owned by all of them" (Br. 6).

The Commission stated "the question presented is whether it is a reasonable *practice* for the East Side Lines to deliver the traffic to the West Side Lines in such a way as to compel the West Side Lines to pay the transfer charge from East St. Louis" (113 I. C. C. 688: R. 24), and then ordered the East Side Lines to cease and desist from the practice of requiring the West Side Lines to bear the charges for transfer services from East St. Louis to St. Louis on westbound freight traffic passing through both points on combination rates which are the same on St. Louis as on East St. Louis (R. 29), and that the East Side Lines shall apply to the *transportation* the practice of bearing or absorbing such charges for such transfer service (R. 29).

(C) The only basis claimed for the "divisions" theory is that the expenditure for the transfer

charge results in less net revenue to the East Side Lines. But that is true of any operating expense. The case could not conceivably be considered as a "divisions" case because the combination rate is divided by the Mississippi—one rate to the East Side Lines and the other to the West Side Lines and St. Louis and East St. Louis are in the same rate district, i. e., the rate to and from each is the same. *Terminal Association* v. *United States,* 266 U. S. 17, 30. The receiving rails of the West Side Lines are on the west bank and the operating expense of the transfer over the River to the interchanges of the West Side Lines is as far removed from divisions as any operating expense which would reduce net revenue, such as repairing a locomotive, or acquiring coal supply, or renting cars, *et id genus omne.* As a general rule, apart from their transportation, railroads have little to sell from which to derive revenue and all operating expenses are paid from revenues derived from transportation. There may be no blending of "divisions" and "practices." "Divisions" as distinguished from "practices" are not only specifically separately treated in the statute but the Commission and this Court have repeatedly treated divisions as a subject to itself. *Tap Line Cases,* 234 U. S. 1; *O'Keefe, Receiver* v. *United States,* 240 U. S. 294; *Manufacturers Railway* v. *United States,* 246 U. S. 457; *New England Divisions,* 261

U. S. 184; *United States* v. *Abilene & Southern*, 265 U. S. 274; *Brimstone Railroad & Canal Company*, No. 240, October Term, 1927, February 20, 1928. "Practices" have similarly been treated separately. *United States* v. *Pennsylvania Railroad*, 242 U. S. 208, 229; *Louisville & Nashville* v. *United States*, 238 U. S. 1, 17; *Northern Pacific* v. *Solum*, 247 U. S. 477, 483; *Pennsylvania Railroad* v. *Puritan Coal Co.*, 237 U. S. 121, 131; *Pennsylvania Railroad* v. *Clark Coal Co.*, 238 U. S. 456, 468, 469; *Skinner & Eddy* v. *United States*, 249 U. S. 557, 562; *Postal Telegraph* v. *Western Union*, 59 I. C. C. 512.

(D) Opposing counsel argue "It was the plain and express purpose of the Commission in making the order it did to make an apportionment of the revenue on through westbound traffic as between the East and West Side Lines." (Br. 68.) In its report the Commission said, "In deciding upon what would be a reasonable practice, primary consideration should be given to what is a fair method of apportioning the revenue regardless of the competition of the Alton." (113 I. C. C. 689; R. 25.)

The statement is obviously not a finding of fact but an observation or conclusion of the Commission with respect to the relief which it failed to grant. The present case does not concern the apportionment of the revenue. The proceeding was not com-

menced, conducted, or determined on such a basis and could not have been, as it dealt with the operating expense of a practice or liability for a transfer charge. Moreover, it concerned the application of the rate which breaks on the Mississippi River. The Commission took no action with respect to the joint rates, and the statement should be considered only in connection with the relief which it denied, and not with that which it granted.

Of all traffic, 29% is westbound; and not more than 15% of the 29% moves on the combination rates, as against 85% of the 29% which moves on joint rates. Having reached its findings and order with respect to the traffic which moves on the combination rates under other sections of the statute, the Commission had the authority to lay to one side because of insufficient record the traffic which moves on joint rates for further consideration under paragraph (6) of Section 15 (ante, p. 11), which includes only "the divisions of *joint* rates, fares, and charges." All of the cases recently decided by this Court concerned the divisions of joint rates. *New England Divisions Case,* 261 U. S. 184, 187, which involved "the joint rates on which had just been increased pursuant to the order entered in *Ex parte 74"; United States* v. *Abilene & Southern,* 265 U. S. 274, 279, in which "the order relates to the divisions of interstate joint rates on traffic interchanged"; *Brimstone Railroad* v. *United*

States, No. 240, October Term, 1927, February 20, 1928, which involved the divisions the carrier might thereafter receive " from agreed joint rates."

II

THE ANTECEDENT HISTORY OF TERMINAL RAILROAD ASSOCIATION v. UNITED STATES, 266 U. S. 17

"The principal terminal facilities of the City of St. Louis are dominated by the Terminal Railroad Association, * * * a corporation whose capital stock is owned in equal shares by the 14 trunk lines entering that city. The Terminal, or its proprietary or tenant lines, owns or controls all bridges and ferries giving access to terminals within and lines directly entering St. Louis, so that no interstate shipment can enter or leave the city except over those lines." *Manufacturers Railway* v. *United States,* 246 U. S. 457, 462.

Since 1914 the West Side Lines have been paying the transfer charges of the Terminal Railroad Association on westbound traffic, notwithstanding the decision in *United States* v. *Terminal Railroad Association,* 224 U. S. 383, 398, in which this Court said, "If the Terminal Company was in law and fact the agent of all, the mere unification which has occurred would take on quite a different aspect. It becomes, therefore, of the utmost importance to know the character and purpose of the corporation which has combined all of the terminal instrumentalities upon which the commerce of a great city

and gateway between the East and West must depend."

Citing from the testimony of Mr. Albert L. Perkins, an experienced railroad engineer and manager, and the witness upon whom the defendants in that case chiefly relied to uphold the advantages of the unified system, this Court said (p. 405), "The witness, however, points out that such a terminal company should be the agent of every company, and furthermore, that its service should not be for profit or gain. In short, that every railroad using the service should be a joint owner and equally interested in the control and management."

That case concerned the agreement of October 1, 1889, in which the Terminal granted to each of the proprietary companies "a right of joint use with each other" of all said terminal properties of the Terminal then held or that may be thereafter acquired in St. Louis and East St. Louis, including the St. Louis bridge and tunnel for passenger and freight, express and mail business, and for interchange of the same between each other and with the public. Each proprietary company accepted the right of joint use granted by the Terminal and agreed that it would forever make use of the bridge and terminal properties of the Terminal for all passenger and freight traffic within its control through, to, and from St. Louis, and destined to cross the Mississippi River at St. Louis, and pay therefor as

therein provided. Three accounting departments were established, passenger, freight, and the bridge and tunnel. As to passenger traffic expenses and fixed charges were apportioned on a wheelage basis. The freight tolls covered the handling of freight billed to East St. Louis and turned over to the bridge for St. Louis delivery and all track deliveries; but should stations be established in St. Louis for local, and in East St. Louis for through, freight, to which stations the several lines bill direct, the expenses of such stations, including interest on the cost thereof, shall be paid by the roads using them on a tonnage basis. (*Terminal Railroad Association v. United States*, R. No. 115, pp. 155, 156, 158, Supreme Court, October Term, 1924, 266 U. S. 17.)

On January 16, 1903, an agreement supplementary to the agreement of October 1, 1889, was executed in which it was recited that the Terminal granted to each of the companies, and each of the companies accepted, "a right forever of joint use with each other and with such other companies as might be admitted, as proprietary lines, to joint use thereof of all terminal properties of the Terminal Association then held or that might thereafter be acquired in said St. Louis and East St. Louis, for passenger and freight, express and mail business, and for the interchange of the same between each other and with the public, the right granted to each proprietary company to remain as appurtenant to the railroad then owned by such proprietary com-

pany; and each of said proprietary companies, parties to said agreement, agreed forever to make use of the bridge and terminal properties of the Terminal Association for all passenger and freight traffic within its control through, to, and from St. Louis and destined to cross the Mississippi River at St. Louis." (*Terminal Railroad Association* v. *United States,* R. No. 115, p. 163, Supreme Court, October Term, 1924.) It is further recited that the agreement of 1903 provided that the rates of toll or charges should be fixed, so as to produce a sum sufficient each year to pay the fixed charges of the Terminal including certain specified items. (R. No. 115, *supra,* p. 163.)

On March 2, 1914, the United States District Court at St. Louis entered its supplementary modifying decree in which the foregoing provisions for "joint use" were eliminated from the agreement and in lieu thereof there were inserted the provisions that in case any other railroad company should thereafter desire to become a member of the Terminal Association it may become such "with equal rights of joint ownership and control of the combined terminal properties of said Association, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens of the parties hereto" (R. No. 115, *supra,* p. 105), and "Any other railroad company not electing to become a joint owner * * * but desiring the use of the terminal facili-

ties * * * may enjoy the use thereof upon such just and reasonable terms and regulations, as will in respect of use, character and cost of service, place it upon as nearly an equal plane as may be, with respect to expenses and charges, as that occupied by the proprietary companies" (R. No. 115, *supra*, p. 105).

In that decree there appears the following paragraph which was copied from the opinion of this Court (224 U. S. 412), and which was brought back in the opinion in 266 U. S. 25, viz:

> 6. Nothing in this decree shall be taken to affect in anywise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission. (R. No. 115, *supra*, p. 107.)

Contemporaneous with that decree there has appeared in the tariffs of the East Side Lines the following note, viz (R. 261):

> In the absence of through rates on traffic to points west of the Mississippi River, from points named herein, routed via St. Louis, Missouri, through rates will be made on the East St. Louis combination, except when the combination of rates filed with the Interstate Commerce Commission on St. Louis, Missouri, is lower, in which case the St. Louis, Missouri, combination rate will apply.

> This rule will not apply via the C. B. & Q. Nothing in this item is to prevent the application of an existing lower combination via the route of movement.

Citing pages 261–264 of the record, counsel for the appellants state that this note in substance was drawn by the Chief of the Bureau of Tariffs of the Interstate Commerce Commission and was published on short notice by permission of the Commission. (Br. 20.)

The record indicates that on November 23, 1916 (R. 262), the Secretary of the Commission called attention to complaint the Commission had received against the restriction upon the use of rates named from St. Louis to Central Freight Association Territory, in a letter to the Freight Traffic Manager of the Illinois Central Railroad, which was by the latter referred to the Chairman of the St. Louis Eastbound Freight Committee who reported the matter to the various members of the Committee. After a conference the latter committee appointed a subcommittee to confer with the Commission. The subcommittee reported that after a conference with the Chief of the Tariff Division and the Chief Examiner of the Commission in Washington the subcommittee was informed "that the Commission might be satisfied" (R. 263) with the cancellation of certain tariffs and the substitution of what appellants' counsel now claim is the substance of the present tariff. Chairman Hart (R. 263) of the subcommittee, in reporting back to the Eastbound

Freight Committee, stated, "I might add that this plan was approved *pending settlement of the controversy* between the eastern and western lines as to the observation of the bridge toll" (R. 264).

The West Side Lines were not represented at the conference between the representatives of the East Side Lines and the officials of the Commission. (R. 264.)

The record abounds with correspondence, protests, memoranda, etc., with what is known in railroad parlance as the "St. Louis Terminal difficulty" (R. 393–418), covering the spring and summer of 1908 and (R. 420–545) the summer and autumn of 1914, which relate to interchange of freight between the eastern and western roads at St. Louis (R. 454). When, therefore, counsel for appellants indicate that the note to the tariff was drawn by the Chief of the Bureau of Tariffs of the Commission and published on short notice by permission of the Commission in 1917 (Br. 20), it can hardly be said that the note, while bound to be respected as long as it remained in the tariff, had any prospect of escaping continued attack.

As early as 1905, the vice president and general traffic manager of Toledo, St. Louis & Western Railroad (a non-proprietary company), an East Side Line, favored "the receiving line absorbing the bridge charges on through traffic routed via the St. Louis gateway in either direction; as, for instance, any traffic that the Clover Leaf road delivers to your line (Rock Island), through the Ter-

minal Association, your line would absorb the bridge tolls as published, and, in a like manner, any traffic which your line delivers to the Clover Leaf, we would absorb the bridge charges. * * * This seems to me to be fair * * *. You understand that at the present time, the western roads absorb the bridge tolls in both directions; this by reason of their making their rates to and from St. Louis and East St. Louis the same." (R. 492, 493.)

III.

THE AUTHORITY OF THE COMMISSION WAS CONCLUSIVELY DETERMINED BY THIS COURT IN TERMINAL RAILROAD ASSOCIATION v. UNITED STATES, 266 U. S. 17.

Learned counsel for appellants (Br. 40) "very earnestly invite the Court's attention to the fact that the essential character of this controversy between the East Side and the West Side Lines has been indubitably stamped as a rate and division case by the court itself in a very recent decision" (266 U. S. 17).

As irreconcilable difference already exists between the appellants and this appellee on the question whether the case involves "practices" or "divisions," a similar difference now arises with respect to the force and effect of the decision of this Court in 266 U. S. 17. In that case the West Side Lines, as defendants in the case of *United States* v. *Terminal Railroad Association,* 224 U. S. 383, which was commenced under the Sherman Anti-trust Act, procured an order to show cause why the Terminal and the East Side Lines should

not be punished for contempt of the final decree of the District Court. In the recitals of the order to show cause it is stated, paragraph fourteenth, the proprietary companies (East Side Lines) "are not using and have not used the rails of the Terminal Railroad Association as extensions of their own railroads into and out of the City of St. Louis, and have not at any time and are not conducting its and their freight, passenger, mail and express business thereover as required by said decisions of the Supreme Court, the final decree of this Court, and the agreements which have been modified as therein required." (R. No. 115, p. 172.)

It was further charged that the East Side Lines "continue the illegal practice of billing to East St. Louis and then rebilling traffic destined to St. Louis and to points beyond, thus assessing all the transfer charges across the Mississippi River on through freight, moving both east and west, against the West Side Lines, and * * * have continued, ever since said decree, and still continue the same as before, to have all their tariffs break on the east side of the river at East St. Louis on all traffic moving through the St. Louis gateway, thus continuing in effect, instead of abolishing, the said existing illegal practice of billing to East St. Louis or other junction points, and then rebilling the traffic destined to St. Louis or points beyond, in violation of the terms and conditions of said final decree." (R. No. 115, p. 173.)

Without exception, the respondents, Terminal Association and East Side Lines, set up in their defenses to the order that the subject matter was within the complete jurisdiction and control of the Interstate Commerce Commission under the terms and provisions of the Interstate Commerce Act.

Circuit Judges Sanborn, Carland and Stone, on August 21, 1922 (R. No. 115, p. 494), filed an opinion directing that a supplemental decree should be entered "requiring the East Side Lines to pay the reasonable transfer charges of the Terminal on westbound through freight, to the rails of the West Side Lines" (R. No. 115, p. 498).

Subsequently, Circuit Judge Carland having died, Circuit Judge Lewis was called into the case. (R. No. 115, p. 501.) The final decree (R. No. 115, p. 511) adjudged that the East Side Lines "have not paid and are not now paying the reasonable transfer charges" of the Terminal "on westbound through freight to the rails" of the West Side Lines. It was further adjudged that the Terminal was not acting in good faith as the impartial agents of the various proprietary lines.

Appendix B hereto consists of extracts from the briefs of the Terminal and East Side Lines in which they point out that the sections and paragraphs of the statute on which the Government is now relying relate solely to matters within the exclusive jurisdiction of the Interstate Commerce Commission.

Specific reference is made by them in those briefs to Section 1, paragraphs (10) and (11), which re-

lates to car service, interchange of cars, transportation of property, and the duty of every carrier to establish, observe, and enforce just and reasonable rules, regulations, and *practices* with respect to car service. (Appendix B, p. 54.) And again they said, "If the West Side Lines are not satisfied with the present method and practice under which the terminal charges are imposed, then their remedy lies before the Interstate Commerce Commission and can not be invoked as growing out of the violation of any Court decree." (Appendix B, p. 58.)

The case in 266 U. S. 17 was not conducted as a "divisions" case. Responsibility for transfer charges was the question that was decided by the District Court; the decree refers to transfer charges. Who shall be responsible for the transfer charges was likewise the question presented to but never decided by this Court.

In *Terminal Railroad Association* v. *United States,* 266 U. S. 17, this Court said (p. 27): "The controversy is between them and the East Side Lines as to whether the former or the latter shall bear *transfer charges* on westbound through freight"; and again (p. 30): "The suit was brought by the United States to prevent restraint of trade and monopoly in violation of the Sherman Anti-trust Act. It did not relate to the *transfer charges* or division of joint rates"; and again (p. 31): "The original decree does not purport to regulate rates or prescribe divisions of joint rates, *or fix liability for such transfer charges.* On the other hand, it

expressly provides that it shall not affect in anywise or at any time the power of the Commission over charges to be made by the Terminal Association or its subsidiaries, or any power conferred by law upon the Commission." And finally (p. 31): "As the original decree does not prescribe *charges* or fix divisions of joint rates, contempt proceedings will not lie to determine whether the west side lines have paid more than *their fair share of the charges for the services* rendered by the Terminal Association, or to require the east side lines *to make the payments specified in the decree appealed from.* The refusal or failure of the east side lines *to pay the charges in controversy or any other transfer charges* is not contempt of court." (Italics ours.)

Clearly, therefore, this Court did not hold that the controversy relates to *divisions of joint rates* within the meaning of the so-called divisions paragraph (Section 15 (6)) as the appellants now contend. This Court merely protected the jurisdiction of the Interstate Commerce Commission against invasion by the courts and that was all that it did. That branch of the instant case which was left undetermined by the Commission relates to the application of joint rates; so that in the use of the words "practices" and "divisions," this Court included both branches of a case which it held the Commission alone had the authority to consider in the first instance.

This Court never held that the opinion and decree of the District Court were erroneous on the

merits, but only said that Courts would keep their hands off the situation as it then existed and until after the determination of the controversy by the Commission. Thus (p. 30):

> The Interstate Commerce Commission is authorized to establish through routes and joint rates *and to prescribe conditions upon which such routes shall be operated*, and to fix divisions of such rates among carriers. Sec. 15 (1), (3), (6), Interstate Commerce Act, sec. 418, c. 91, 41 Stat. 485, 486.

The West Side Lines in filing the complaint did precisely what this Court told them to do and now they are here with the case which the Circuit Judges of the District Court decided in their favor with the added weight of a full hearing and report and order of the Interstate Commerce Commission and the unanimous decree of the specially-constituted three-judge District Court.

IV

THE EVIDENCE TO SUSTAIN THE ORDER IS COMPLETE

The weakness of the case in 266 U. S. 17 was jurisdiction. The merits of the case were there in full panoply. The case is here in almost the same facts that appeared there. It was not a coincidence that the Interstate Commerce Commission, the body appointed by law and informed by experience, should have reached the same conclusion as the Circuit Judges in the Antitrust Case; or that the three Judges in the specially-constituted District

Court should have reached the same conclusion as the Circuit Judges and the members of the Interstate Commerce Commission. This unanimity all along the line demonstrates the meritorious case of the West Side Lines. Evidence is abundant and a few specific illustrations will suffice.

The total traffic represented by 100% is divided 71% or $1,746,016.55 eastbound and 29% or $713,-161.69 westbound. The West Side Lines pay the Terminal's transfer charges on all eastbound traffic. In the instant case the order of the Commission is limited to westbound traffic which moves on combination rates only, which is not more than 15 per cent of the total of the westbound traffic. It would seem not unreasonable that the West Side Lines should be relieved of the burden of *all* transfer charges for *all* westbound traffic, but they did not succeed to that extent. The East Side Lines, therefore, should not complain when West Side Lines have gained so little in their endeavors to be relieved of an unjust discrimination and burden.

As already pointed out (*ante,* p. 2), the practice at St. Louis is contrary to the practice in practically all of the leading terminal cities and switching and interchange districts of the United States which, under the decisions of this Court, is sufficient to affirm the validity of the order of the Commission in this case.

In *Los Angeles Switching Case,* 234 U. S. 294, the Commission had found that spur tracks and side

tracks of the carriers were a part of their terminal facilities; that deliveries thereon were the same, in cost and character, as the deliveries on the public-team tracks; that the line-haul rates for all other shippers embraced, without additional charge, deliveries on the terminals; and that out of 10,000 cities in the United States where terminal services were performed, only in the cities of San Francisco, Los Angeles and San Diego was the spur-track charge imposed. The Commission found discrimination and entered the order to cease and desist.

The carriers filed the bill to enjoin. The Commerce Court issued the preliminary injunction (188 Fed. Rep. 229, 929), and from that injunction order an appeal was taken to this Court. In reversing the decree and dismissing the bill this Court said (234 U. S. 307):

> The Commission found that these spur tracks were portions of the terminal facilities of the carriers with whose lines they connected, being distinguished from mere plant facilities such as were under consideration in *Chicago & Alton Ry. Co.* v. *United States,* 156 Fed. Rep. 558, and in the cases of the *General Electric Company* and *Solvay Process Company,* 14 I. C. C. 237, 246. Each of the spurs here considered, said the Commission, is in a real sense a railroad terminal at which the carrier receives and delivers freight. It further appears from the report

that the charge for spur-track delivery has been made by all of the carriers at Los Angeles as long as the railroads have had access to that city; that it was first imposed by the Southern Pacific and as the other lines came in they adopted the policy of the line already there; that as to certain commodities the charge was not imposed until quite recently and at all times until the Hepburn Act went into effect there was great variation in charge as between individual shippers. It is added that there are 97 places in California to which what are known as coast terminal rates apply, rates lower than to intermediate points; only in Los Angeles, San Francisco and San Diego is there such a charge for spur-track delivery, though in many of these places such delivery is furnished. To the north, in Portland, Seattle, Tacoma, and a large number of other points which also enjoy coast terminal rates, the Southern Pacific, Northern Pacific and Great Northern lines, impose no such charge, and to the east where defendants' lines have their termini in cities competing with Los Angeles, this charge is also unknown.

To the already overwhelmingly persuasive volume of the judicial decrees and the findings and order of the Commission on this subject there may be added the practice of the entire commercial, shipping and transportation world.

"Transportation includes delivery" is the foundation of a thoroughly considered and prepared

opinion of Judge Cardozo of the Court of Appeals of the State of New York in the case of *New York Central* v. *General Electric Company,* 219 N. Y. 227, in which he said, "But whatever is essential in order to complete delivery, the carrier must do. That is what it is paid for when it collects its regular rates * * * (p. 234). The limits of place within which delivery is due, will vary with varying conditions. * * * All that we can safely say is that there must be such a delivery as is customary and reasonable (p. 235). * * * We come back then to the test, which, vague as it is, remains the only safe one, and we ask ourselves whether, in the light of all the circumstances, such a form of delivery is customary or reasonable. That it is not customary is established, we think, by uncontroverted evidence * * * (p. 236). The defendant's standard of delivery does not conform, therefore, to the standard or custom (p. 237). We think it fails also when we test it by the standard of reason. A railroad's duty to carry is a duty to carry over its right of way. * * * Industrial spurs, within the switching limits designated by the carrier, are to be regarded, indeed, for many purposes, as an extension of the terminal (*Los Angeles Switching Case,* 234 U. S. 294)." See also *Texas & Pacific Railway* v. *Reiss,* 183 U. S. 621; *Myrick* v. *Michigan Central,* 107 U. S. 102.

If switches, spurs and sidings, as held in the foregoing cases, constitute terminals on which delivery

shall be made, what may be said of the vast properties of the Terminal Railroad Association of St. Louis as terminals upon which deliveries shall be made to the West Side Lines?

The following cases cited by counsel for the appellants are not controlling or even persuasive.

Pennsylvania Paraffine Works v. *Pennsylvania Railroad,* 34 I. C. C. 179, in which the Commission ordered the carrier to furnish necessary equipment, both ordinary and special, upon reasonable request. The order was annulled in *United States* v. *Pennsylvania Railroad Company,* 242 U. S. 208. *Warnock* v. *Chicago & North Western Railway,* 21 I. C. C. 546, appears to be an outgrowth of the case of *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific,* 218 U. S. 88, and relates to a readjustment of rates between the Missouri and Mississippi rivers. *In re Bills of Lading,* 52 I. C. C. 671, 696, which discusses the arrival of goods and notice to the consignee. *Borden's Farm Products* v. *New York, New Haven & Hartford,* 92 I. C. C. 270, failure or refusal of carriers to perform icing service on dairy products while exacting rates including such service found to constitute an unreasonable and unlawful practice; affirmed on further argument, 102 I. C. C. 497. *Los Angeles Passenger Terminal Cases,* 100 I. C. C. 421, relate to certificate of public convenience and necessity to permit the abandonment of the operation of certain passenger and freight train service,

except industrial freight-switch service, on the main line of the Southern Pacific in Los Angeles, and other like subjects. *Consolidated Lumber Co.* v. *Director General,* 101 I. C. C. 284, dismissed a complaint which assailed certain California lumber rates and does not appear to relate to a practice. *Somerville Iron Works* v. *Central Railroad,* 101 I. C. C. 683, sustained the existing rates on cast-iron pipe and apparently has nothing whatever to do with any practice. *Peoria & Pekin Union Railway Rates, Regulations and Practices,* 115 I. C. C. 469, appears to have established joint rates between trunk lines and the Peoria and Pekin Union and prescribed just, reasonable and equitable divisions thereof; as the report was issued July 12, 1926, the order entered pursuant thereto is apparently satisfactory to the parties.

CONCLUSION

On November 29, 1905, the original petition was filed in the District Court under the Sherman Anti-trust Act and during the more than 22 years that the controversy has waged this Court has heard and determined four appeals and one original suit by the United States, *United States* v. *Terminal Railroad Association,* 215 U. S. 595; 224 U. S. 383; 236 U. S. 194; *Ex parte United States,* 226 U. S. 420; *Terminal Railroad Association* v. *United States,* 266 U. S. 17. The end of one case appears to have been but the beginning of another. This Court has already issued five mandates and the end

is not yet. For length of years, number of appeals and mandates the controversy is without a parallel in the annals of the Court.

The order of the Commission was within its power, the final decree of the District Court dismissing the bill of complaint for want of equity was right and should be affirmed.

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MARCH, 1928.